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No. 08-270

Supreme Court, U.S.
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In The
Supreme Court of the United States

TH INVESTMENTS, INC.,

Petitioner,

v.

KIRBY INLAND MARINE, L.P. and
PORT OF HOUSTON AUTHORITY
OF HARRIS COUNTY, TEXAS,

Respondents.

On Petition For Writ Of Certiorari
To The Court Of Appeals Of Texas

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether a Petitioner who knowingly purchases land bounded and submerged by tidally-influenced, navigable waters – after Petitioner has received formal notice, as required by law, that such land is subject to a moving tidal boundary line – may assert a claim for a "judicial taking" when the land was actually eroded and taken away decades before Petitioner's purchase by a combination of natural and manmade forces.

II. Whether a "judicial takings" claim may be asserted by a Petitioner who failed to meet its burden to establish a recognized ownership interest under state law in the claimed land that Petitioner now alleges was taken through the judicial power of the State.

III. Whether a "judicial takings" claim may be asserted by a Petitioner who cannot show that the state court's action constitutes a sudden change in the law that was unpredictable in terms of relevant precedent.

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PREFACE

> "The soil covered by the bays, inlets, and arms of the Gulf of Mexico within tidewater limits belongs to the State, and constitutes public property that is held in trust for the use and benefit of all the people."

Lorino v. Crawford Packing Co., 175 S.W.2d 410, 413 (Tex. 1943).

STATEMENT OF THE CASE

A. Introduction

This case involves tidally-influenced, submerged property in the vicinity of a marine industrial facility used for commercial barge fleeting located within the Port of Houston, Texas, just beyond the northern reaches of Galveston Bay, near the main Houston Ship Channel, Old River, and the San Jacinto River. The general area and the site at issue are shown in the Appendix to this Opposition ("Opp.App.(page)") at Opp.App.1.[1] The parties stipulated that the area is within the tidewater limits of the Gulf of Mexico. 4RR229. Petitioner TH Investments, Inc. claimed

[1] The Petition will be cited as "Pet.(page)." Petitioner's Appendix will be cited as "Pet.App.(page)." The reporter's record will be cited as "(Volume)RR(page)." Pleadings will be cited by volume and page as "(Volume)CR(page)." Common Exhibits will be cited as "CX(number)." The Port Authority's Exhibits will be cited as "PX(number)." Kirby's Exhibits will be cited as "KX(number)." Petitioner's Exhibits will be cited as "TX(number)."

ownership of approximately 27-acres of submerged lands within these tidewater limits in the form of what it refers to as "Tract 1." Petitioner's ownership claim was based upon a non-warranty deed conveyed by the Carter Heirs in 2002, which used the same historical description to describe and identify Tract 1 as that first used in an 1896 deed, even though the tract was located in a dynamic, tidally-influenced environment and bounded by tidewaters.

This case began as a lease dispute between Petitioner and Respondent, Kirby Inland Marine, L.P. ("Kirby"), which had previously held a nominal lease from the Carter Heirs to stave off any potential interference with its barge fleeting operations to the immediate north and east of the historic 27-acre tract. Kirby, disputing that Petitioner held any ownership rights in the submerged lands of the once historic 27-acre tract, involuntarily joined the State of Texas and the Port of Houston Authority of Harris County, Texas (the "Port Authority"). The State was later dismissed since, in 1927, it had conveyed by legislative act to the Port Authority's predecessor (the "Harris County Houston Ship Channel Navigation District of Harris County, Texas," *see* Opp.App.19-20), all of the submerged lands "as now or hereafter located" in the area at issue, including those lands submerged beneath the waters of the Old River and the San Jacinto River. Pet.App.111, Act of April 5, 1927, 40th Leg., R.S., ch. 292, 1927 Tex. Gen. Laws 437, 438.

A seven-day bench trial was held on what became Petitioner's trespass-to-try title claim. The trial court entered detailed findings of fact (which are entitled to deference by this Court)[2] and conclusions of law, and held that Petitioner never owned Tract 1, as ownership had vested in the Port Authority, successor to the State of Texas, as the tract gradually submerged over time below the line of mean high tide. Specifically, the trial court held that the Port Authority owns submerged lands at the site by virtue of the 1927 Act of the Texas Legislature. *See* Pet.App.88-103.

On appeal, the Texas Court of Appeals for the Fourteenth District affirmed the trial court's judgment, concluding in a lengthy opinion that overwhelming evidence supports all of the trial court's fact findings and that ownership of the submerged Tract 1 vested in the Port Authority pursuant to long-established Texas coastal property rules as the land gradually submerged and disappeared beneath the line of mean high tide due to the indistinguishable effects of erosion, subsidence, and other forces. The Court of Appeals affirmed the trial court's rejection of the novel, made-for-litigation survey methods advanced by Petitioner at trial, and agreed that it is no

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[2] *Hernandez v. New York*, 500 U.S. 352, 366 (1991) ("In the absence of exceptional circumstances, we would defer to the state-court factual findings, even when those findings relate to a constitutional issue."); *see also Fry Roofing Co. v. Wood*, 344 U.S. 157, 160 (1952). Petitioner has made no arguments for any such exceptional circumstances, and none exist here.

longer possible to identify the historic 27-acre tract or to unravel the geomorphological and manmade forces that caused it to submerge and disappear.

This is a case wholly grounded in settled Texas coastal property law. There is no split among the federal circuits that is pertinent to the resolution of this case. Nor is there any divergence among Texas authorities as to the governing principles. Both the trial court's findings and the Texas Court of Appeals' opinion were correct in all respects and supported by conclusive, or virtually conclusive evidence, and multiple Texas judicial opinions dating back to 1859. The controlling issue in state court – Petitioner's ownership of land submerged beneath the tidal waters of Texas – was not a federal issue.

No reason exists for this Court to grant certiorari to revisit the validity of the "judicial takings" doctrine because, in this case, Petitioner failed to establish any ownership interest in the submerged lands allegedly "taken." Petitioner cannot undo the trial court's detailed fact findings, affirmed by the Texas Court of Appeals, and cannot demonstrate by citation to Texas authority that the Texas courts departed from prior precedent that caused Petitioner to lose any previously-recognized property rights. The "taking" that occurred here was not by any judicial action, but by a combination of natural and manmade forces, acting gradually and imperceptibly over time, to submerge the historic 27-acre tract fully below the line of mean high tide. Petitioner's effort to avoid the effect of these forces and the moving line of the tide –

which defines the ownership boundary between private uplands and public submerged lands – was grounded in legally indefensible survey methods and a patently erroneous reading of *Coastal Industrial Water Authority v. York*, 532 S.W.2d 949 (Tex. 1976), as more fully discussed herein.

B. Background

Tract 1 has been submerged beneath the tidal waters of Old River and the San Jacinto River for decades. The dramatic evolution of the tract can be seen in a series of photographs that span seven decades. Opp.App.8. The earliest depiction of the site by a 1916 U.S. Geological Survey topographical map shows the area in the shape of a "Rabbit's Head." Opp.App.7. The general area of Tract 1, prominently defined by the meander boundary[3] of Old River, is the "Ear" of the "Rabbit's Head." Today, no such "Rabbit's Ear" or "Rabbit's Head" shape or defined tract can be identified. 6RR61; 7RR236, 244; 8RR73-74; 10RR49;

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[3] A meander boundary, by definition, is the present line where water meets upland. Pet.App.29-33, 98-99; *Kenedy Mem'l Found. v. Dewhurst*, 90 S.W.3d 268, 280 (Tex. 2002) ("A shoreline boundary cannot be determined without water level measurements"). Nedra Foster, the Port Authority's Licensed State Land Surveyor, understood a meander to be the existing, winding boundary of water against upland – a line above water. 9RR170. Because a meander boundary inherently moves and changes over time, it is the present, existing meander line to which a survey or deed refers. Petitioner's surveyor, William Merten, agreed. 5RR124.

Pet.App.91-92. Instead of a "Rabbit's Head," a mud "flat" usually covered by tide waters now exists at the location. 8RR372; 10RR72; Pet.App.92. Petitioner's own photographic exhibits, taken during rare periods of low tide, dramatically illustrate the "featureless flat," and show the absence of any identifiable meander line. TX105; TX170; 10RR71; Pet.App.92. Erosion, evident at the site since 1916, eroded away both the larger "Rabbit's Head" and the smaller 27-acre "Rabbit's Ear," as illustrated by a 1961 aerial photograph. Opp.App.9. Petitioner did not challenge the trial court's finding that the "Rabbit's Head" can no longer be identified (Pet.App.91-92), and Petitioner's own experts admitted that the shape they purportedly surveyed in 2003 materially differs from the historic "Rabbit's Head." 8RR73-74; 7RR236-37.

In 2002, the Carter Heirs attempted to convey title to Tract 1 to Petitioner. Since the property was submerged, the Carter Heirs gave Petitioner only a non-warranty deed. 6RR140; Pet.App.3. Petitioner's deed, and all predecessor deeds dating back to 1896, described Tract 1 as being bounded by a tidal meander boundary, with reference to the "meanders of Old River." Pet.App.89. An "Addendum for Coastal Area Property," included in the Contract of Sale for Tract 1, put Petitioner on formal notice at the time of its purchase that the property was subject to a moving boundary line because it shared "a common boundary with the tidally influenced submerged lands of the state." Pet.App.4-5; Opp.App.5-6. This Addendum is statutorily-required notice to a purchaser that

changes in the moving tidal boundary line could cause the gain or loss of property. *See* TEX. NAT. RES. CODE ANN. §33.135. Opp.App.25-26. The notice also informs the purchaser that Texas law prohibits any encumbrance on or over the applicable tide line, without appropriate permission. *Id.* Despite this formal notice, Petitioner's President neither read the deeds himself nor engaged counsel to do so. 4RR241. The Carter Heirs' representative thought Petitioner "had lost their minds" to pay the agreed purchase price for the tract. 6RR138-39.

Virtually all of Tract 1 was submerged beneath the tidal waters of Old River when the Carter Heirs executed the non-warranty deed to Petitioner. Petitioner admits in this Court that the property was submerged at the time of its purchase. Pet.4 (the "property was almost entirely submerged. . . ."); *id.* at 5 ("chain of title . . . had been transferred numerous times since it became mostly submerged. . . ."); *id.* at 6 ("mostly submerged by shallow water most of the time."). Although the exact date of submergence of the property can never be known, portions of it were intertidal by 1955, and it was submerged since at least 1973. 10RR14-15, 78-79, 140. The only emergent area above mean high tide, referred to as the "little thumb," resulted from self-help activities of Petitioner's predecessors-in-title. Pet.App.93. Petitioner, at the time of purchase, was aware that the land was submerged and that the Port Authority owned lands submerged beneath the San Jacinto and Old Rivers. 4RR231-32.

The Port Authority is a political subdivision of the State of Texas, and was created for the purpose of operating and developing ports and waterways in the public interest. Opp.App.19-20. In 1927, the Texas Legislature conveyed certain submerged lands in Harris County, Texas, to the Port Authority (Pet.App.109-12), including the area of Tract 1:

> . . . all the submerged lands lying and being situated under the waters of . . . San Jacinto River . . . [and] . . . Old River . . . so far up said streams as the State may own same, together with all lands lying and being situated under the waters of Old River . . . and all other tidal flats or overflow land adjacent to or appurtenant to the above-mentioned streams . . . as now or hereafter located. . . .

The waters in the vicinity of Tract 1 have been used for commercial barge fleeting since 1978, and are subject to significant commercial maritime use and occasional recreational use. Pet.App.90. After purchasing bare record title, Petitioner asserted that Kirby's barge fleeting operations were located on and around Tract 1, and then attempted to renegotiate the Carter Heirs' former lease with Kirby. However, after obtaining an assignment of the lease from the Carter Heirs, Petitioner sought a substantial rent increase from Kirby, who balked at the proposed rent increase from $1,000 per month to $35,000 per

month, and advised Petitioner that it was operating over public lands.[4] 5RR37; 1CR153-54; Pet.App.5, 7.

Kirby filed suit against Petitioner to enjoin it from interfering with Kirby's business operations and to obtain a declaratory judgment that the State of Texas – not Petitioner – owned the submerged tract. 1CR2-30. After learning that the State had conveyed all submerged lands in the area to the Port Authority by the 1927 Act, Kirby then involuntarily joined the Port Authority. 1CR47-56; 4CR658.

Contrary to Petitioner's assertion, the Port Authority did not join the suit to establish "its ownership" or "to acquire property without paying for it." Pet.7, 8. Instead, the Port Authority pleaded "only defensively" and disclaimed any intention to take the property of another. 13CR2369.

C. The Decision Below

Although Petitioner did plead a "takings" theory below, it did not move for judgment on that ground, did not adduce any evidence of the value of Tract 1, and did not seek any findings with regard to that claim. At trial, Petitioner assumed the role of plaintiff in its trespass-to-try-title claim (Pet.App.6), bearing

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[4] Whether Kirby's fleeting operation and improvements encroached upon Tract 1 was a disputed issue. The trial court found that Kirby operated to "the north and east of and adjacent to Tract 1." Pet.App.90. As a result, Petitioner did not, as it asserts, succeed to any "leasehold rights." Pet.6.

the burden of proof on three key factual disputes: the location of the tidal meander boundary for Tract 1; the placement of the southern boundary of the tract; and, based on the *York* case, the existence of a "subsidence exception" to the well-established Texas rule that lands submerged beneath tidal waters belong to the State.[5] *York*, 532 S.W.2d at 949.

The trial court held that Petitioner never owned Tract 1, as ownership had vested in the Port Authority, successor to the State of Texas, as the tract gradually submerged below the line of mean high tide. The state appellate court agreed and held that the trial court's judgment did not violate the "takings" clause, reasoning that the property was lost as a result of natural occurrences, like erosion, or natural occurrences acting upon the land in conjunction with manmade causes. Pet.App.43-44.

The Texas Court of Appeals did not, as Petitioner asserts, resolve the issues in this case "principally as a matter of law." Pet.11. Petitioner challenged a number of the trial court's factual findings, and the appellate court both conducted "legal sufficiency" and "factual sufficiency" reviews of the evidence bearing

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[5] By stating that submerged property is abundant in the United States, and that usually it is not worth the trouble to take, Petitioner is admitting that its case is essentially one in which it seeks to remedy a perceived individual injustice. Pet.22 n.11. Whether submerged lands have any value is a highly individualistic determination, varying from parcel to parcel.

on the trial court's findings, and resolved those factual issues against Petitioner. Pet.App.27-40.

Petitioner's failure of proof on fact-intensive state law issues defeats its "takings" claim. The state courts could not have taken from Petitioner property that Petitioner's predecessors-in-title never owned – submerged lands lying below the line of mean high tide. The state courts could not have taken property that could not be located or identified. And, the state courts cannot be said to have strayed from *York* when Petitioner failed to prove that this case involved *York*'s same facts.

REASONS FOR DENYING THE WRIT

Petitioner tries to inflate this case into one presenting "an important question of constitutional law" to entice the Court to revisit the issue of whether state court action affecting property rights can constitute a "judicial taking." Pet.12. While there are unsettled issues regarding the judicial takings doctrine, this case presents the poorest possible candidate for the Court to revisit that doctrine given the compelling evidence demonstrating that Petitioner did not establish a property interest. The record is also clear that the Texas courts decided the case within well-settled legal principles, and that it was Petitioner that sought a radical departure from Texas law.

A petitioner asserting a "taking" must show that it possesses a recognized property interest that may be protected by the Fifth Amendment. *Penn. Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124-25 (1978). As this Court stated in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1030 (1992), "Although the Takings Clauses may secure a right of compensation for the governmental appropriation of private property rights, they do not create or define those rights, which is a matter left to state property law."

Petitioner cannot make that showing because it failed to meet its burden to establish an ownership interest under state law. A fundamental flaw with the Petition is that it simply assumes that Petitioner has an ownership interest that was "taken," when in fact, Petitioner never legally or factually established one under Texas law. If Petitioner did not possess a property interest, then it follows that nothing was taken by subsequent judicial action. This is not a case where Petitioner's ownership rights were "retroactively extinguished" (Pet. 7), but, rather, is a case where Petitioner retroactively seeks to obtain ownership to land that was lost to its predecessors-in-title through the process of erosion and submergence beneath tidal waters.

In every instance where a "judicial taking" has been found, the state court action involved a change in existing property law. In this case, the state courts followed long-standing background principles of Texas coastal property law, dating back over 100

years. The state courts made no change in previously recognized property rights.

Petitioner's briefing in the state courts was largely devoted to advancing a novel ownership theory that directly contradicted decades of Texas coastal land law. In general, this body of Texas law is that a land patent conveying land from the State to private ownership does not convey lands submerged beneath tidal waters, and that the boundary between private uplands and public submerged lands moves over time as the line of the tide moves. This principle is a fundamental limitation on the rights conveyed by the State in the first instance.

Petitioner does not meaningfully address either the facts or the legal analysis that support the Texas courts' conclusion that Petitioner failed to establish ownership of a property right, a matter governed by state law. Petitioner likewise fails to mention the core fact that drives the legal analysis – the fact that the submerged lands at issue lie beneath *tidal* waters, which are owned by the public and affected with the public interest. No rule of Texas coastal property law recognizes Petitioner's ownership of the submerged land at issue. To the contrary, it has been a long-standing tenet of coastal law that "[i]f the sea encroached and the upland owner lost his land, he had no redress. . . ." *State v. Balli*, 144 Tex. 195, 190 S.W.2d 71, 100 (1944).

I. This Case Presents a Poor Vehicle to Address Unsettled Questions about the Existence of a Judicial Takings Doctrine.

A. A Judicial Taking Does Not Occur When the Court's Decision Follows Decades of Established Precedent.

The "judicial takings" doctrine has no application here where there has been no court action that constitutes a drastic change in the law or a rejection of historic precedent. The Texas Court of Appeals followed well-established Texas coastal property law dating back to 1859, which Petitioner was expressly informed of in the transactional documents when it attempted to purchase Tract 1. The Texas courts did not make "new" Texas law. Pet.19.

Where courts have recognized a "judicial taking," the plaintiffs have shown that the state court decision constituted a sudden change in state law that was unpredictable in terms of relevant precedent. For the most part, courts making such "sudden changes" changed the definition of property in a way that caused the property owner to suffer a loss or diminution of their previously-recognized rights. *See Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 162-63 (1980) (the Florida court's decision was contrary to the long-established general rule); *Stevens v. City of Cannon Beach*, 510 U.S. 1207, 114 S.Ct. 1332, 1335 (1994) (Scalia, J., dissenting from denial of petition for writ of certiorari) (the Oregon court announced a "new found" doctrine of custom; the petitioner was never allowed to develop the facts as to

whether the doctrine applied); *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980) (the California court's holding was contrary to prior precedent); *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673 (1930) (Missouri court suddenly shifted its view on the appropriate forum for a tax challenge, depriving the taxpayer of any forum); *Muhlker v. N.Y. & Harlem R.R. Co.*, 197 U.S. 544 (1905) (the New York court attempted to abandon its prior precedents); *Robinson v. Ariyoshi*, 753 F.2d 1468, 1473-75 (9th Cir. 1985) (the Hawaiian court radically changed the face of Hawaiian water law). It is sudden changes in the law, unpredictable in terms of relevant precedents, that operate as the device to allow the state to assert "retroactively that the property never existed at all." *Hughes v. Washington*, 389 U.S. 290, 296-97 (1967) (Stewart, J., concurring).

A judicial decision regarding property rights must dramatically depart from settled precedent to operate as a "taking" because the takings clause generally requires payment of just compensation when government action interferes with the investment-backed expectations of the property holder. *See Penn Cent. Transp. Co.*, 438 U.S. at 124. As a result, "judicial takings" have been found in situations in which settled expectations are interrupted. All of Petitioner's cited cases deal with a change in prior law, not the application of well-settled rules.

Here, the Coastal Addendum in the Contract of Sale for Tract 1 put Petitioner on notice that an issue existed as to the extent that the tract, bounded by a

tidal meander boundary, might remain subject to private ownership, and informed Petitioner of long-standing Texas coastal boundary law. As Justice Stewart recognized in *Hughes*, "To the extent that the decision of the [state court] . . . arguably conforms to reasonable expectations, we must of course accept it as conclusive. But to the extent that it constitutes a sudden change in state law, unpredictable in terms of the relevant precedents, no such deference would be appropriate." *Hughes*, 389 U.S. at 296 (Stewart, J., concurring); *see also Lucas*, 505 U.S. at 1028-29 (recognizing in the context of regulatory takings that the government could restrict property use without paying compensation to the owner if the restriction was supported by background principles of state property and nuisance law).

The Texas Court of Appeals' decision follows: (i) long-standing Texas coastal boundary law, (ii) the 1927 Act,[6] and (iii) the Texas Natural Resources Code §§11.012, 33.135. Referring to the leading Texas cases addressing tidal boundaries, the Texas Court of Appeals concluded: "To our reading, the trilogy of *Luttes*, *Rudder*, and *Lorino*, recognized and explained the bright line rules that have long dictated land ownership. And the trilogy of *York*, *Kenedy Memorial*

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[6] The 1927 Act does nothing more than place the Port Authority in the shoes of the State of Texas, which otherwise would own all of the lands lying submerged under tidal waters. 43 U.S.C. §1311. The Act was not a basis for depriving the Petitioner of any property interest, as Petitioner admits. Pet.10.

Foundation, and *Brainard*, reaffirmed these bright line rules." Pet.App.41-42 (citing *Luttes v. State*, 324 S.W.2d 167, 175 (Tex. 1958); *Rudder v. Ponder*, 293 S.W.2d 736, 741 (Tex. 1956); *Lorino*, 175 S.W.2d at 413-15; *York*, 532 S.W.2d at 949; *Kenedy*, 90 S.W.3d at 280; *Brainard*, 12 S.W.3d at 17). In *Kenedy* the Texas Supreme Court stated:

> . . . *stare decisis* is never stronger than in protecting land titles, as to which there is great virtue in certainty. We would be very reluctant to discard a rule determining seashore boundaries that has served as long and satisfactorily as the rule in *Luttes*, thereby upsetting long-settled expectations, and we could not do so absent far more compelling evidence than can be offered here.

90 S.W.3d at 281. The same "bright line" tidal boundary rule was followed in this case. Pet.App.42-43. No unpredictable change in state law occurred in this case. Petitioner's repeated characterization of this case as one of a "retroactive nullification" of its property rights is simply inaccurate.

Given the substantial body of Texas case law, the provisions of the Texas statutes, and the inclusion of the Coastal Property Addendum in Petitioner's Contract of Sale, the record is conclusive that the outcome in this case was well within reasonable expectations. Having neither read the Tract 1 deed, nor engaged counsel to do so, Petitioner could have no legitimate, reasonable expectation of ownership.

Petitioner's suggestion that it relied upon communications with the Port Authority before it purchased Tract 1 (Pet.5) is contrary to the record. Port Authority representatives met with Petitioner only *after* Petitioner acquired bare record title to Tract 1 from the Carter Heirs. 9RR243-46. There is no evidence in the record to support Petitioner's assertion that it "enjoyed [the property rights] for a time until being informed that they never existed." Pet.14. Petitioner signed the Contract of Sale in September 2002 and signed the deed in November 2002. CX48; CX49. Kirby immediately challenged Petitioner's ownership, filing the state court action in March 2003. 1CR2-30. The Port Authority did not recognize any interest of Petitioner in submerged lands for "decades," as Petitioner has alleged. Pet.18.

B. It is Axiomatic that for a Taking to Occur the Petitioner Must Possess a Recognized Property Interest.

What constitutes property and the rights that attach to ownership are primarily a matter of state law. *United States v. Cress*, 243 U.S. 316, 320 (1917); *Wash. Legal Found. v. Mass. Bar Found.*, 993 F.2d 962, 973 (1st Cir. 1993).

> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law – rules or understandings that secure certain

> benefits and that support claims of entitlement to those benefits.

Board of Regents v. Roth, 408 U.S. 564, 577 (1972); *see also Stevens*, 114 S.Ct. at 1334 ("As a general matter, the Constitution leaves the law of real property to the States."). Since property rights are defined in the federal system by state law rather than federal law, this Court has held that state court definitions of property raise no federal constitutional issues and this Court lacks jurisdiction to revise such state court definitions. *See, e.g., Demorest v. City Bank Co.*, 321 U.S. 36, 42 (1944); *Broad River Co. v. South Carolina*, 281 U.S. 537, 541 (1930); *Central Land Co. v. Laidley*, 159 U.S. 103, 109 (1895); *see Cress*, 243 U.S. at 320 (discussing a potential taking by the United States of land and water rights and finding that states have the authority to establish for themselves such rules of property as they may deem expedient with respect to streams of water within their borders); *Barney v. Keokuk*, 94 U.S. 324, 337-38 (1876) (assessing a takings case and holding that the question of whether land formed by accretion along the banks of a river between high and low water marks belongs to the state is one to be determined by the courts of the state and from decisions of the highest court of the state).

1. Lands Submerged Beneath the Line of Mean High Tide Presumptively Belong to the State of Texas.

Tract 1 is indisputably within the tidewater limits of the Gulf of Mexico. The trial court found that the water over, around, and in the area of the submerged lands claimed by Petitioner is subject to the ebb and flow of the tide (Pet.App.90), Petitioner stipulated to this tidal influence (*id.*; 4RR229), and every witness at trial who was asked testified that the waters covering and surrounding the property are tidal. 4RR231-32; 6RR58; 7RR45-46; 7RR231, 280; 8RR4-8; 8RR203; 8RR218; 9RR31-32; 9RR121, 150; 9RR344; 10RR15; 10RR36. The site is a "coastal environment," and the waters of San Jacinto and Old Rivers are tidally-influenced estuaries of the Gulf. 10RR36; Pet.App.111, 116.

Long-standing, well-established Texas authority holds that lands submerged under tidal waters – regardless of how shallow the water – are conclusively presumed to be owned by the State, and may only be conveyed out of State ownership by an act of the Texas Legislature. *State v. Lain*, 162 Tex. 549, 349 S.W.2d 579, 583 (1961); *Lorino*, 175 S.W.2d at 413-15; *City of Galveston v. Mann*, 135 Tex. 319, 143 S.W.2d 1028, 1032-33 (1940); *Heard v. Town of Refugio*, 129 Tex. 349, 103 S.W.2d 728, 732 (1937); *Manry v. Robinson*, 122 Tex. 213, 56 S.W.2d 438, 446 (1932); *Landry v. Robinson*, 110 Tex. 295, 219 S.W. 819, 820 (1920); *City of Galveston v. Menard*, 23 Tex. 349, 391, 396-97 (1859); *see also* TEX. NAT. RES. CODE ANN. §11.012(c)

(Pet.App.116). The rule is predicated on the State's public policy to hold lands submerged under tidal waters in trust for all people. *Mann*, 143 S.W.2d at 1033.

Petitioner did not (and could not) contend that the State granted the submerged bed of Old River within the J.T. Harrell Survey to Petitioner's predecessors-in-title in 1845. A grantee of the State of Texas takes dry land to the water's edge, with submerged lands specifically reserved by the State for the public trust. TEX. NAT. RES. CODE ANN. §11.012(b); *City of Austin v. Hall*, 93 Tex. 591, 57 S.W. 563, 565 (1900); *Menard*, 23 Tex. at 396. As the Texas Court of Appeals properly concluded, the boundaries of whatever dry land that was granted within the survey description of the J.T. Harrell Survey ended at the meanders of Old River and the San Jacinto River. Pet.App.29-33.

2. The Boundary Between Public Submerged Tidal Lands and Private Uplands Moves with the Line of the Tide.

The obvious corollary to the rule that a patent from the state does not convey submerged lands, is the rule that the line of the tide is the boundary between State-owned submerged lands and privately owned uplands. In the more than 14 decades since Texas courts first addressed this issue, the State courts have consistently held that as the line of the

tide moves over time, the boundary between State-owned submerged lands and privately-owned uplands moves with it. *See Luttes*, 324 S.W.2d at 175 (line of mean high tide for common law land grants); *Rudder*, 293 S.W.2d at 741 (line of mean higher tide for Spanish and Mexican grants). The same standard applies to tidally-influenced waters in rivers and bays that applies to waters of the Gulf. *See Luttes*, 324 S.W.2d at 173 (applying the line of the tide to determine boundary for landward line of the shore abutting the lagoon known as the Laguna Madre); *Kenedy*, 90 S.W.3d at 280 (applying line of the tide where "seawater inundation is regular, shallow, and somewhat infrequent"); *Crary v. Port Arthur Channel & Dock Co.*, 92 Tex. 275, 47 S.W. 967, 970 (1898) (holding the phrase "waters of the Gulf of Mexico" was "comprehensive" and "sufficiently broad to embrace at least all bays, inlets, and streams upon the gulf coast to the extent to which they are subject to the ebb and flow of the tide"). Under this well-established rule of Texas law, the only way to survey land bounded and covered by tidally-influenced waters is to survey the line of mean high tide. *Kenedy*, 90 S.W.3d at 281. This "bright line" rule of the "tide line" protects both public and private interests by providing a certain and objectively determinable method to delineate the boundary between public submerged lands and private dry uplands. *Id.*

Thus, Texas law is clear that once private upland becomes submerged below the line of mean high tide, ownership then vests in the State. *City of Corpus*

Christi v. Davis, 622 S.W.2d 640, 642 (Tex. Cir. App. – Austin 1981, writ ref'd n.r.e.). This is not some "new" rule of property law – it has been the law of Texas for decades. *See Menard*, 23 Tex. at 396; *Lorino*, 175 S.W.2d at 413-15; *Rudder*, 293 S.W.2d at 741; *Luttes*, 324 S.W.2d at 175. And, it is because of this outcome that Texas requires explicit, written notice to all purchasers of land bordering on tidal waters, pursuant to Section 33.135 of the Texas Natural Resources Code, that the moving tidal boundary is subject to change, just as Petitioner was given notice in this case. Opp.App.25-26.

The reemergence of any dry land (the area referred to by Petitioner as the "little thumb") on Tract 1, which was completely submerged, was the result of self-help activities to build up the land.[7] Petitioner admits that Texas law does not allow a private party to acquire title through self-help that raises dry upland from submerged land lying beneath tidal waters. Pet.12; *see Brainard*, 12 S.W.3d at 19; *York*,

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[7] Dr. Douglas Sherman, the Port Authority's geomorphological expert, testified that the reemergence of "land" at the site was caused by the placement of barges and the dumping of dredged spoils. 10RR111, 137. Without the anchor barges placed by Western Towing beginning in the 1980s that changed the flow pattern of the water and caused the deposit of sediment, Dr. Sherman believed that there would not be any land above mean high water anywhere. 10RR90; *see also* 7RR60-61, 90-91, 93-94; 10RR74, 108; PX12; PX65d. Petitioner's expert, Dr. William Dupre, also identified dredge spoil dumping areas that matched Dr. Sherman's testimony. 7RR198-99, 201.

532 S.W.2d at 952; *Lorino*, 175 S.W.2d at 414; *Natland Corp. v. Baker's Port, Inc.*, 865 S.W.2d 52, 58 (Tex. App. – Corpus Christi 1993, writ denied). In sum, the evidence showed, and the trial court found, that the "little thumb" was not a remnant of the historic 27 acre-tract, but was a manmade bit of land grown out of submerged land by the activities of the lessees of Petitioner's predecessors-in-title. Pet.App.93.

3. Petitioner Could Not Rebut the Presumption of State Ownership of Tidally-Influenced, Submerged Lands by Relying on *York*.

Petitioner sought a new rule of law allowing it to escape the conclusive presumption of State ownership of lands submerged under tidal waters and the rule that ownership of property changes with the movement of the tide line over time. Petitioner pled for a "subsidence exception" – if the submergence of a tract under tidal water was caused by "subsidence," then, Petitioner argued, that the usual rules governing public ownership of submerged lands were to be suspended, entitling Petitioner to ownership of Tract 1. Petitioner relied on *York* to support this novel approach.[8]

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[8] While Petitioner characterizes *York* as one of "a number of precedents under Texas law recognizing private ownership rights in submerged land" (Pet.6), Petitioner fails to address the grounds on which the Texas Court of Appeals distinguished *York*. Pet.App.20-40.

As the Texas state courts found, however, *York* is readily distinguishable from Petitioner's case. First, *York* did not involve lands covered by tidal waters. 532 S.W.2d at 951 n.1. The *York* opinion is clear that if the parties there had argued the legal consequences of the fact that Mr. York's property laid beneath tidal waters, the outcome of the case necessarily would have been different. *Id.* Petitioner boldly over states *York*'s holding in asserting to this Court that the "Texas Supreme Court held [in *York*] that ownership of submerged lands is permissible under Texas water rights law and that the riparian land submerged below the mean high tide line in that case could not be allocated to public ownership without compensation. . . ." Pet.8. In *York*, the court assumed that "the tide has no effect" because the parties did not make "any reference to the fact or legal effect of the tide." 532 S.W.2d at 951 n.1.

Second, the definitive clarity of the cause of the submergence present in *York* is not present in this case. Petitioner sought to understate the role of erosion, and overstate the role of subsidence, in an effort to advance its claim to ownership under *York*. In *York*, however, there was a single cause of submergence – subsidence – but here, there were multiple causes, including erosion, that caused the disappearance of the tract. *Id.* at 954. Subsidence alone could not account for the submergence of Tract 1. 10RR79-80. Dr. Sherman testified: "[I]f subsidence were the only force of change at this site, we would still see that rabbit's head preserved. It would just be deeper."

10RR49; *see* 10RR79. According to Dr. Sherman, "[I]t is abundantly clear that this is a . . . confusing and complicated environment. We see substantial evidence of significant erosion and deposition at this site. We see evidence of subsidence and we see a strong imprint of human activity across most of this site as well." 10RR46. Photographs of the site spanning seven decades show the dramatic evolution. Opp.App.8. Petitioner's expert agreed that various forces impacted the site. 6RR207-08.

The state courts did not hold that erosion "trumps subsidence . . . taking the case out of the *York* rule. . . ." Pet.9. Instead, the courts held that the credible evidence did not permit a determination of the degree to which subsidence or erosion caused the submergence. Pet.App.24-25, 34-40, 91. The inability of Petitioner's witnesses to reconcile the undisputed facts with their theories, the profoundly conflicting evidence as to the role played by subsidence in the submergence of Tract 1, the overwhelming evidence of the erosion of the Old River meander boundary line, and the multiplicity of geomorphological causes impacting the site, all demonstrated that the simplistic use of "subsidence" as a litmus test for an exception to long-standing Texas coastal boundary law is unworkable.

Petitioner's simplistic attempt to reduce the analysis of *York* to "subsidence" versus "erosion" – illustrated by its claim that no set of facts would have mattered to the Texas courts if there was some erosion even minimally responsible for the submergence

(Pet.11) – also overlooks other key facts distinguishing *York* from this case. One, argued below, is that the boundaries of the land in *York* were readily identifiable because they had not eroded and had been preserved through surveys over the years. 532 S.W.2d at 952. Here, the tidal meander boundaries of the property have been obliterated by the effects of erosion and other forces.

Additionally, in *York*, it was the *absence* of evidence of public interest in the site that allowed the court to decide the case on the factually incorrect premise that the water over the submerged property was not tidal. *Id.* at 951 n.1. Once the *York* court made this assumption, all of the policy considerations triggered by the fact of tidal waters were avoided. In this case, contrary to Petitioner's assertions, the public use doctrine is directly implicated because the Port Authority owns the submerged lands for public maritime purposes under the 1927 Act (Pet.18 n.9), and the locale is, in fact, used for marine commerce in the Port of Houston. The state trial court specifically found that the ownership question posed an "issue affecting the public interest in the use and enjoyment of tidally-influenced, navigable waters." Pet.App.99-100. Evidence of public interest in the area is conclusive.

The Texas courts have specifically recognized that *York*'s holding is narrow and limited. *Brainard v. State*, 12 S.W.3d 6, 17 (Tex. 1999); *Davis*, 622 S.W.2d at 643. As a result, the Texas courts correctly held

that the factual elements of *York* were not present as to Petitioner's claim. Pet.App.20-25, 100.

4. Petitioner Could Not Identify the Property Allegedly Taken.

In a Texas trespass-to-try-title case, the general test for determining the sufficiency of a description of land is whether the tract can be identified with reasonable certainty. *Zobel v. Slim*, 576 S.W.2d 362, 369 (Tex. 1978). The test is not whether dirt can be found at the site, but whether the description of record title is so definite and certain upon the face of the instrument itself or other writing referred to that the land can be identified with reasonable certainty. *Wilson v. Fisher*, 144 Tex. 53, 188 S.W.2d 150 (1945); *Osborne v. Moore*, 112 Tex. 361, 247 S.W.2d 398 (1923); *Morrison v. Dailey*, 69 Tex. 287, 6 S.W. 426 (1887). As a trespass-to-try-title plaintiff, Petitioner bore the burden to prove its superior title and the location and identity of the land. Pet.App.94; *Bacon v. Jordan*, 763 S.W.2d 395, 396 (Tex. 1988). Petitioner did not meet this burden.

In its historical description, Tract 1 was bounded by (1) the Jones-Hare line to the east (a vertical, north-south line), (2) the south line of the J.T. Harrell Survey to the south (a horizontal, east-west line), and (3) the meanders of Old River to the north and west. As to the latter boundary line, since no meander line existed in fact, Petitioner sought to identify Tract 1 by

asserting the existence of a fictional underwater meander line.

In his previous surveys involving tidally-influenced areas, Petitioner's surveyor, William Merten, only looked to the line of mean high tide to determine present boundary lines. 8RR80. For this case, Merten created new methods to survey the boundaries of the submerged site. *Id.* First, for the northeastern and northern meander boundary, Merten used an old dredging permit to guide his estimation of the prior, but now nonexistent, meander lines. 8RR36-41, 101; 9RR144. Merten described his methodology as a *hypothetical estimate* of where he believed the historic meander shoreline *should* have been. 8RR38, 112. Kirby's surveyor, Nedra Foster, testified that this is not an accepted or reliable method for a Licensed State Land Surveyor to establish land title boundaries. 9RR144, 154. Second, Merten tried to find the historic northwestern, but now non-existent, meander line by "probing" the submerged land with his feet. Merten described the "probing" as wading through the water while hanging onto a boat – he felt the bottom with his feet, alternately stepping from soft to hard ground, which he assumed to be the former submerged bank of Old River, while taking GPS readings at intervals so that he could connect them and draw a line. 8RR44-47.

Merten's magical thinking in "surveying" the claimed tract is reflected by his assumption that all 27-acres described by the original 1896 deed remained intact – meaning that there had been no

erosion whatsoever of the meander boundary in the 106 years since 1896. Petitioner concedes that this is not the case since it admitted below that erosion and accretion have contributed to a change in the *shape and appearance* of Tract 1. As the court of appeals found, "the determining question here is not whether a surveyor *could* or *did* mark lines for the northern and western 'meander' boundaries of the tract, but whether the surveyor properly surveyed lines bounded and covered by tidally-influenced waters." Pet.App.33 (emphasis in original).

The evidence established, and the Texas courts found, that Merten's probing was unreliable. Pet.App.34, 94. Merten admitted both that he had never used "probing" previously to locate a submerged boundary line (8RR119) and that, "There is [sic] no sources stating that probing is the – is an accepted – accepted method." 8RR184. Merten said that if ten surveyors went out to the area, they would get ten different results if they tried to find his line. 8RR117. Asked at trial, "There is no boundary out there today that someone trying to retrace your steps can find on the river bottom?," Merten responded, "On the river bottom, no." 8RR114.

Foster confirmed that Merten did not follow accepted surveying practices with his "probing." 9RR167. She testified that "you can find the hard and soft [soil] anywhere out there" in the area. 9RR163. The two geomorphology experts agreed. Dr. Sherman opined that Merten's "hard/soft" findings did not indicate the presence of any submerged bank.

10RR103. Dr. Dupre agreed that the land lost by river-related processes "is no longer distinct from the adjacent channel." 6RR219; *see also* 9RR52 (expert Gil Chatagnier who performed a bathymetric survey of the site: "I've never heard of anybody walking in the water and doing a geotechnical investigation.").

Given the existing site, Foster testified that the only proper method to survey the meander boundaries today is to survey the line of mean high tide. 9RR156, 121-22, 170-71, 194. Foster's mean high tide survey (KX2) reflects that the only "upland" (dry land above mean high tide, 9RR148) at the site today is an area less than one tenth of one acre in size. 9RR124-125. This "little thumb" of land is nothing more than a pile of dumped dredge spoils. 7RR198-99, 201.

Petitioner not only failed to establish the boundary that is the "meanders" of Old River, Petitioner also incorrectly located the boundary marked by the south line of the J.T. Harrell Survey. On this issue, Merten essentially ignored prior surveys in 1936 and 1951 by Licensed State Land Surveyors, and instead relied on "record angles" and current GPS technology (5RR124, 137), which he then attempted to justify based upon the course call of the 1838 Harrell Survey "thence east," as meaning due east; however, even Merten's line was not a perfect, straight east-west line. The boundary line, as placed by Merten, conflicted with adjacent surveys in the area. Both the state trial court and the appellate court found as a factual matter that Merten did not use reliable methods to locate

this line, which the trial court placed several hundred feet further north than Petitioner argued.

Without a reliable survey establishing the boundaries of the claimed tract, Petitioner could not locate or identify Tract 1 with reasonable certainty. No "taking" can be established where the alleged property owner cannot identify the land it claims was taken.

C. No Arbitrary Enforcement of the Coastal Boundary Laws Occurred in this Case.

For the first time on appeal, Petitioner argues that the Port Authority's transactions to acquire Carter Kirby Island show that the Port Authority has previously paid private property owners for submerged lands, lands that are "indistinguishable from" or "identical in character" to Tract 1. Pet.8, 18. Petitioner did not raise any of these arguments in connection with its "judicial taking" claim in the state courts. Instead, Petitioner argued below that the Port Authority should be estopped from taking a contrary position in this case, based on its conduct in the Carter Kirby Island transactions from the 1950s and 1970s. The trial court granted summary judgment in favor of the Port Authority on Petitioner's estoppel claim, a ruling that was not appealed by Petitioner. 13CR2391-2496; 22CR4717; Pet.App.103. As a result, at the trial held three months later, very little evidence relating to Carter Kirby Island or the Port

Authority's purchase of it was admitted, and the trial court made no findings of facts and conclusions of law relating to the Carter Kirby Island transactions.

Petitioner has mischaracterized the Carter Kirby Island transactions in its briefing by incorrectly asserting that they evidence the Port Authority's purchase of submerged lands. On July 15, 1950, when the Port Authority contracted to purchase a one-half interest in Tract 1 and the adjoining Carter Kirby Island tract from Mary Niedermeier, the Port Authority's contract of sale and escrow agreement explicitly excluded submerged lands from the transaction and conveyance, providing that,

> Inasmuch as *Buyer [the Port Authority] claims and asserts title to and ownership of all of the submerged land* lying and being situated at mean high tide under the waters commonly known as Lost Lake and other waters tributary to the Houston Ship Channel, *such submerged land is expressly excluded herefrom.*

CX19 (emphasis added). The conveyance contemplated by the contract of sale was also expressly conditioned upon a survey of the identified lands, "excluding such submerged land," and payment for the identified lands was contingent on the performance of a survey. *See id.* Thus, when the Port Authority began acquiring Carter Kirby Island in 1950, Ms. Niedermeier contractually agreed that the Port Authority owned any submerged lands within the

general property description of Carter Kirby Island, and accordingly, such submerged lands were expressly excluded from the Niedermeier transactions.

In 1950 and 1951, Mr. J.S. Boyles surveyed Carter Kirby Island and determined it to be 730.6 acres. He did not, however, survey Tract 1 to the north of Carter Kirby Island. The boundary of Boyles' survey was the line of mean high tide. 10RR378. By 1952, when the parties sought to close the transaction, Tract 1 had not been surveyed and the Port Authority was unable to determine the location or the extent of the lands, if any, above mean high water. 21CR4358; CX44; CX45. Accordingly, the Port Authority did not pay for any acreage of Tract 1, taking only the one-half interest in Carter Kirby Island. The Port Authority had agreed to include both tracts in the 1952 deed "for convenience." *See id.* By 1954, the parties still had not completed the sale with respect to Tract 1 and the Port Authority never took title to any interest that Ms. Niedermeier had in the tract (which, because it was never surveyed, was never determined). Accordingly, the Port Authority agreed to a correction deed, which was expressly made "subject to the terms of said sales agreement of July 15, 1950" (which excluded submerged lands), to clarify that nothing passed in the 1952 deed from Ms. Niedermeier to the Port Authority. CX45; 21CR4358-59, 4406-10.

In 1979, when the Port Authority and the Carter Heirs settled a condemnation action for the other one-half interest in Carter Kirby Island, no part of that

settlement was an attempt by the Port Authority to pay for submerged lands below mean high tide. 10RR350. The intent was for the property description in the condemnation judgment to match the property description in the 1950 sales agreement when the Port Authority purchased the first one-half interest (which had explicitly excluded submerged lands). 10RR370-71. In acquiring ownership of the Island, the issue for the Port Authority was not the fact that the property was "wet," but whether it was submerged below the line of mean high tide. 10RR378. At bottom, there is no evidence in the record that the Carter Kirby Island was submerged below the line of mean high tide at the time of these transactions in the 1950s and 1979, and no evidence that the Port Authority acted inconsistently with its position in this case.

While both Carter Kirby Island and Tract 1 share some of the similar physical boundaries (the line of mean high tide) and physical characteristics, including submergence, no private landowner ever claimed to own submerged parts of Carter Kirby Island. There is no evidence in the record that any private landowner has ever asserted against the Port Authority claims like those made by Petitioner. Petitioner's assertion that the Port Authority took a "new position" in this litigation, which was neither expected nor foreseeable (Pet.18, 21), is not supported by the record.

II. This Case Does Not Warrant Review as a Judicial Takings Case When Natural and Manmade Forces "Took" the Property from Private Ownership, Not an Act of the Judiciary.

As the Texas Court of Appeals correctly found under the facts, a combination of natural occurrences and manmade forces caused the submergence of Tract 1. Pet.App.43-44. The state court merely made a determination as to the scope of property ownership based on the evidence before it. There was no "taking" through any intentional act on the part of the Port Authority or the state courts. A central premise of coastal property law is that tidal meander boundary lines move over time, causing owners to gain or lose property. The moving line of the tidal boundary between public and private ownership has always been an inherent risk in owning coastal lands, a risk conclusively established by decades of precedent. For this reason, Texas has required, by statute, that those purchasing coastal properties be given notice of the risk at the time of purchase. Petitioner was given that statutory notice, which it chose not to read or discuss with counsel. Opp.App.5-6.

Petitioner advanced novel, unsupportable factual claims and sought a radical departure from Texas law in urging a new "subsidence" exception to the rule that the boundary between private and public ownership moves with changes in the line of the tide. The state courts refused to change Texas law, instead applying *stare decisis* to preserve certainty with

regard to land titles. The result here was completely foreseeable under historic precedent and the statutory warning given to Petitioner at its time of purchase. Petitioner was given an adequate level of due process fairness through the statutory notice at the time of purchase, through its opportunity to establish its ownership interest during the seven-day trial of this case, and through its appeal in the Texas state court system.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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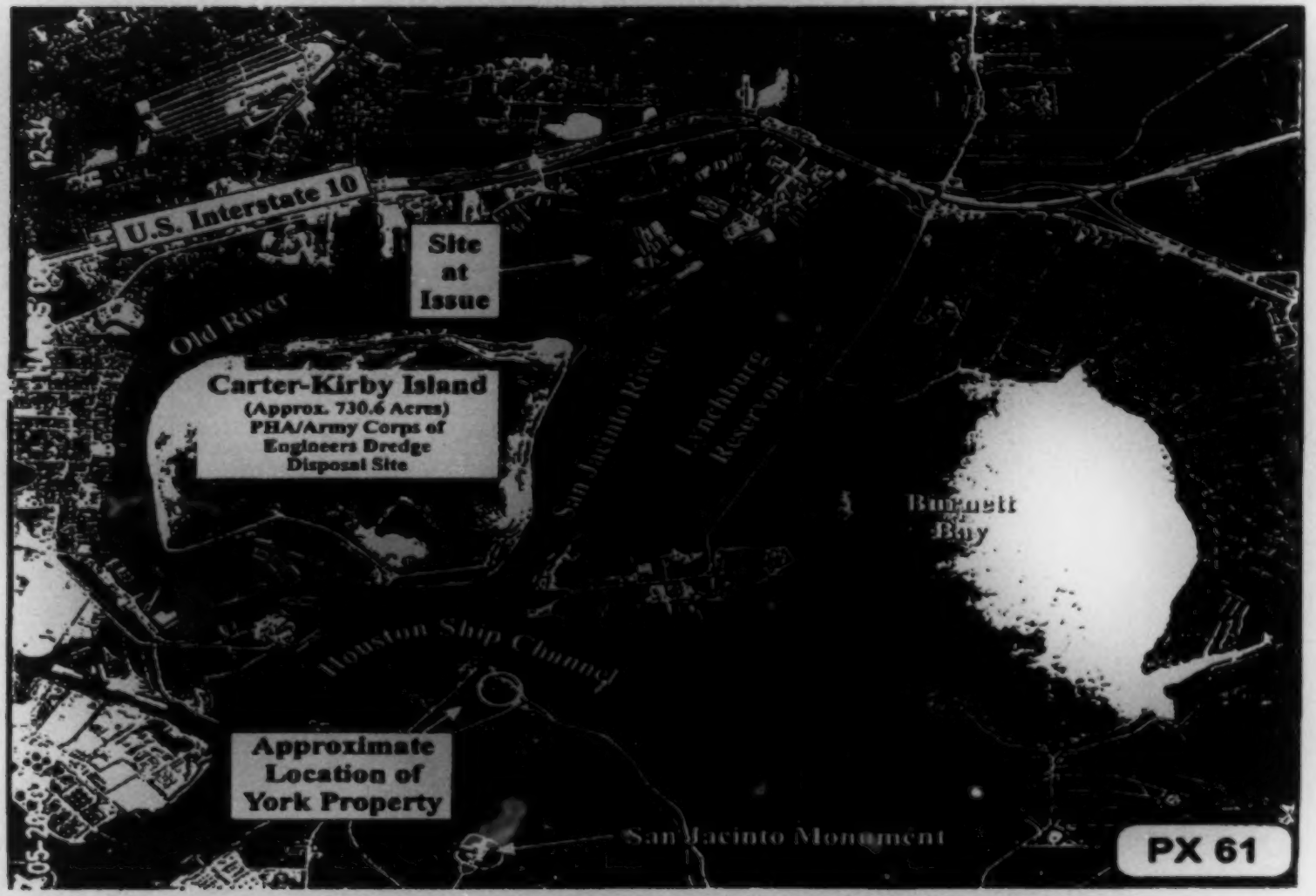
The Area at Issue



App. 2

[LOGO]

TEXAS ASSOCIATION OF REALTORS®

COMMERCIAL CONTRACT – UNIMPROVED PROPERTY

USE OF THE FORM OF PERSONS WHO ARE NOT MEMBERS OF THE TEXAS ASSOCIATION OF REALTORS® IS NOT AUTHORIZED.

Texas Association of REALTORS® [Illegible]

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1. **PARTIES:** Seller agrees to sell and convey to Buyer the Property described in Paragraph 2. Buyer agrees to buy the Property from Seller for the sales price stated in Paragraph 3. The Parties to this contract are:

   Seller: Carter Heirs, Severally but not Jointly

   Address: 435 Conti Lane, Victoria, Texas 77904

   Phone: 361-573-1555 Fax: _____

   Buyer: T H Investments, Inc.

   Address: 3302 Ashment Lane, Missouri City, Texas 77459

   Phone: 281-403-9454 Fax: 281-335-1515

2. **PROPERTY:**

   A. "Property" means that real property situated in Harris County, Texas at N/A (*address*) and that is legally described on the attached Exhibit ___ or as follows:

      All of Seller's right, title and interest in the surface only of 27 acres, more or less, described on Exhibit A attached hereto.

Due to the influence of water eroding and sediment building up the shoreline, seller makes no representation as to the actual acreage of the subject property.

B. Seller will sell and convey the Property together with:

(1) all rights, privileges, and appurtenances pertaining to the Property, including Seller's right, title, and interest in any ~~[illegible]~~ [/s/ KSC/MEC], utilities, adjacent streets, alleys, strips, gores, and rights-of-way;

(2) Seller's interest in all leases, rents, and security deposits for all or part of the Property; and

(3) Seller's interest in all licenses and permits related to the Property.

(*Describe any exceptions, reservations, or restrictions in Paragraph 11 or an addendum.*)

3. SALES PRICE:

A. At or before closing, Buyer will pay the following sales price for the Property:

(1) Cash portion payable by Buyer at closing	$_____
(2) Sum of all financing described in Paragraph 4	$500,000.00
(3) Sales price (sum of 3A(1) and 3A(2))	$500,000.00

App. 4

Initialed for Identification by
Buyer /s/ HBC Seller _____

[/s/ KSC/MEC]

[LOGO]

PROMULGATED BY THE
TEXAS REAL ESTATE COMMISSION (TREC)
P.O. BOX 12188], AUSTIN, TX 78711-2188

ADDENDUM FOR COASTAL AREA PROPERTY

ADDENDUM TO EARNEST MONEY CONTRACT BETWEEN THE UNDERSIGNED PARTIES CONCERNING THE PROPERTY AT

Channelview, TX

(Location of Property)

IN ACCORDANCE WITH SECTION 33.135, TEXAS NATURAL RESOURCES CODE, THE FOLLOWING NOTICE IS INCLUDED AS PART OF THE CONTRACT:

NOTICE REGARDING COASTAL AREA PROPERTY

1. This real property described in and subject to this contract adjoins and shares a common boundary with the tidally, influenced, submerged, lands of the state. The boundary is subject to change and can be determined accurately only by a survey on the ground made by a licensed state land surveyor in accordance with the original grant, from the sovereign. The owner of the property described in this contract may gain or lose portions of the tract because of changes in the boundary.

2. The seller, transferor, or grantor has no knowledge of any prior fill as it relates to

the property described in and subject to this contract except: See Exhibit C Special Provisions

3. State law prohibits the use, encumbrance, construction, or placing of any structure in, on, or over state-owned submerged lands below the applicable tide line, without proper permission.

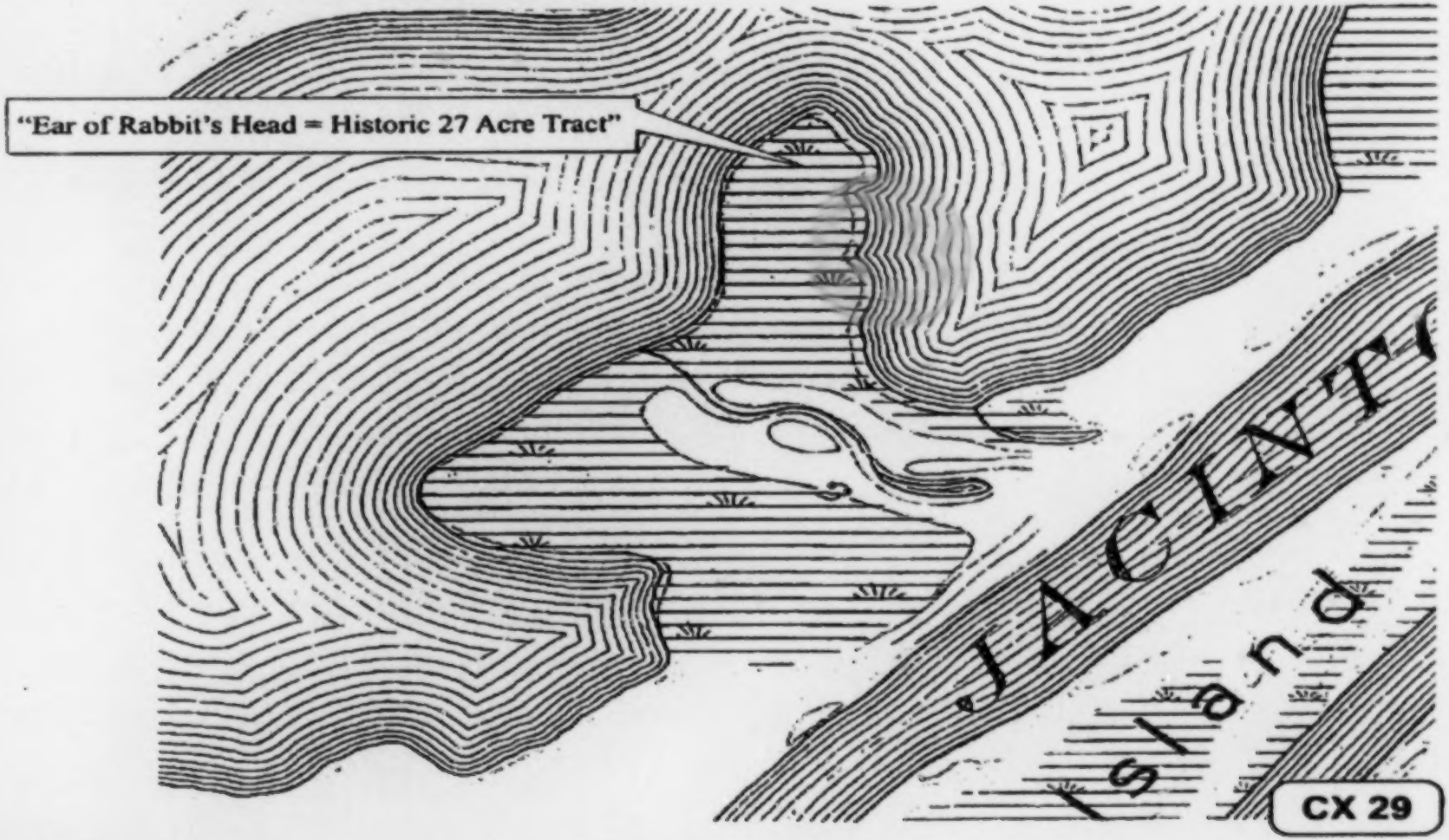
4. The purchaser or grantee is hereby advised to seek the advice of an attorney or other qualified person as to the legal nature and effect of the facts set forth in this notice on the property described in and subject to this contract. Information regarding the location of the applicable tide line as to the property described in and subject to this contract may be obtained from the surveying division of the General Land Office in Austin.

/s/ Bobby L. Henry, Pres.	See attached signature page
Buyer T H Investments, Inc.	Seller Carter Heirs
Buyer	Seller

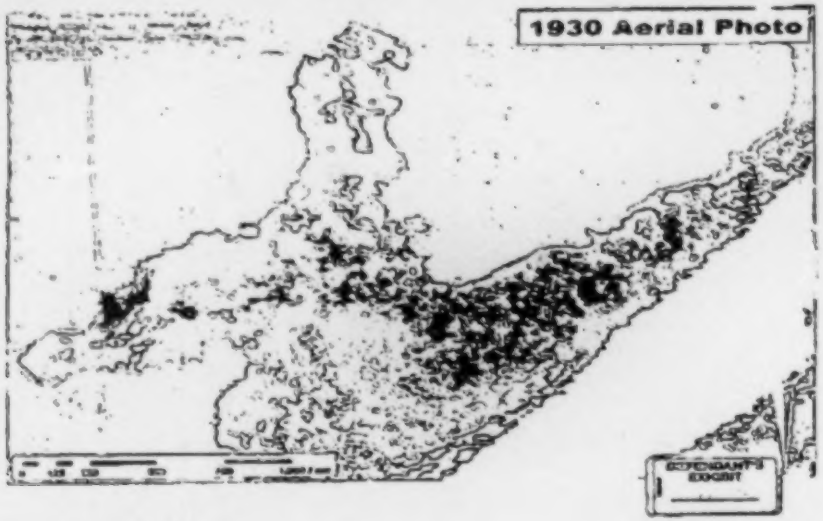
This form has been approved by the Texas Real Estate Commission for use with similarly approved or promulgated contract forms. Such approval relates to this form only. No representation is made as to the legal validity or adequacy of any provision in any specific transactions. It is not suitable for complex transactions. (12-94) TREC No. 33-0.

App. 7

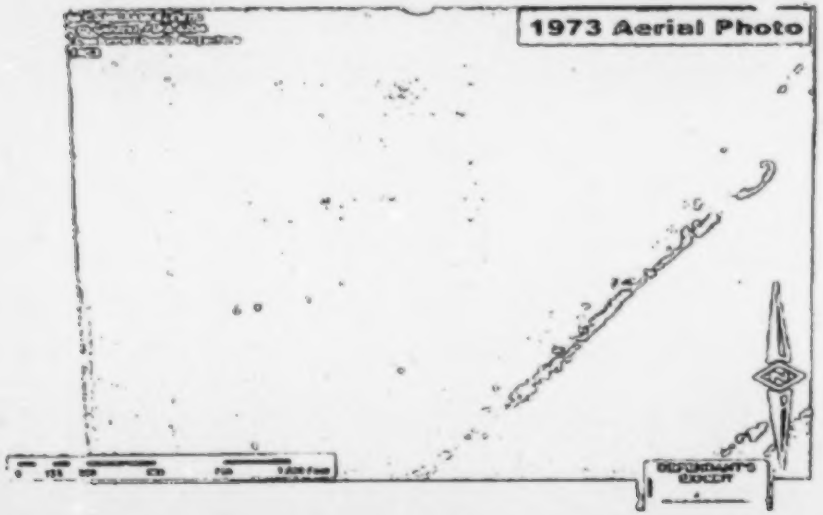
The 1916 Topographic Map Shows the "Rabbit's Head"

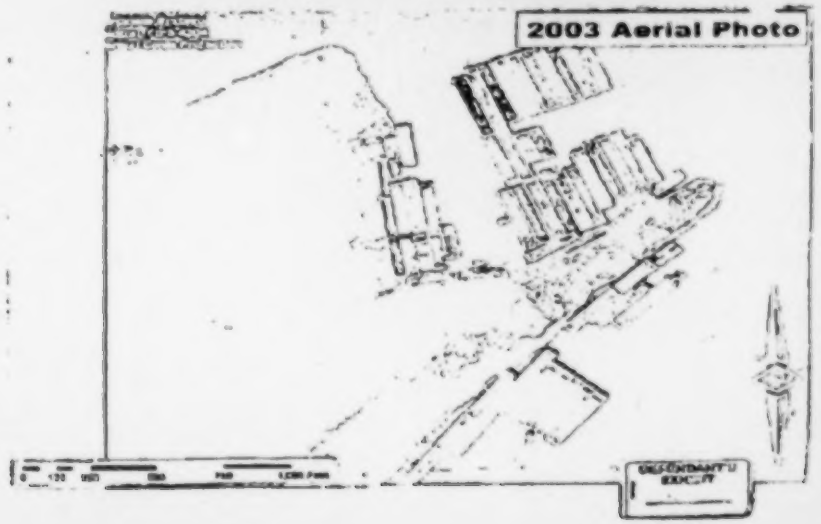


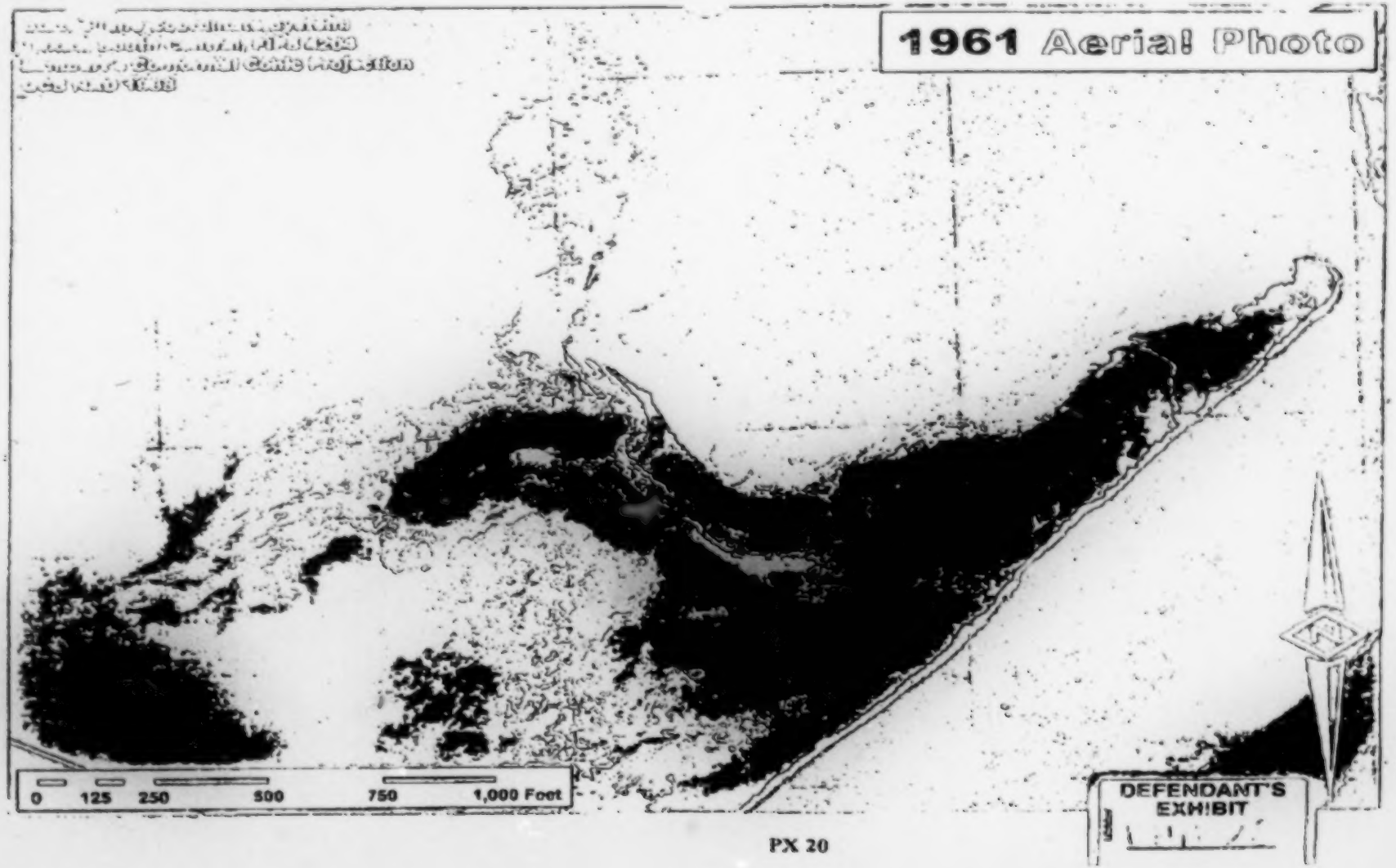
BEST AVAILABLE COPY


1930 Aerial Photo

1964 Aerial Photo


1973 Aerial Photo


2003 Aerial Photo


1961 Aerial Photo
0 125 250 500 750 1,000 Feet
DEFENDANT'S EXHIBIT

PX 20

THE STATE OF TEXAS

COUNTY OF HARRIS

This contract of sale and escrow agreement made and entered into by and between Mary A. Niedermeier of Marion County, Texas, individually and as Independent Executrix of the Estate of George S. Niedermeier, deceased, acting herein by and through her duly authorized agent and attorney in fact, J. A. Niedermeier, hereinafter called "Seller", and Harris County Houston Ship Channel Navigation District, a navigation district organized and existing under the laws of the State of Texas and domiciled in Harris County, Texas, hereinafter called "Buyer",

WITNESSETH:

1. Subject to the terms, provisions and conditions hereof and for the consideration herein set forth, Seller agrees to sell and convey to Buyer by a good and sufficient general warranty deed executed by Seller and Buyer agrees to purchase from Seller an undivided one-half interest in and to the following described property and premises situated in Harris County, Texas:

> All those certain lots, tracts or parcels of land, lying and being situated in Harris County, Texas on the waters of Buffalo Bayou and San Jacinto River, and being a part of the Eastern half of the Harris and Carpenter League of land and being particularly described as follows:

Commencing on the South line of the J.T. Harrell survey where same intersects the San Jacinto River;

Thence down the West bank of said San Jacinto River with meanderings to Buffalo Bayou at a point opposite Lynchburg;

Thence up Buffalo Bayou with its meanderings to the mouth of Old River at Zavala Point;

Thence up Old River with its meanderings to the South line of the J. T. Harrell Survey;

Thence East with the said South line of the J. T. Harrell Survey to the place of beginning.

ALSO twenty-seven acres of land, more or less out of the South part of the J. T. Harrell survey adjoining the last described tract on the North, which twenty-seven (27) acres, more or less, is fully described in a deed from J. P. McGee to Emma A. Hudson, which is of record in Volume 88, pages 590 et seq., of the Deed Records of Harris County, Texas, and being the same property conveyed to Mary A. Niedermeier, Independent Executrix of the Estate of George S. Niedermeier, deceased by J. R. Andrews, Substitute Trustee, by deed dated January 2, 1934, and recorded in Volume 935, Page 706, Deed Records, Harris County, Texas,

save and except and undivided 1/32 interest (same being 1/4 of the usual 1/8 royalty) in and to the oil, gas and other minerals in and under and that may be produced from the above described land, to be paid or delivered to the said Seller, her successors and assigns, as her own property, free of cost from royalty oil, gas and/or minerals forever, together with the right of ingress and egress at all times for the purpose of storing, treating, marketing and removing the same therefrom, which said interest in and to said minerals is to be a non-participating royalty and is not to participate in the bonus paid for any oil, gas or other mineral lease covering said land nor in any money rentals which may be paid to extend the time within which a well may be begun under the terms of any lease covering said land, and in the event oil, gas and/or other minerals are produced from said land then the said Seller, her successors and assigns shall receive a full 1/32 portion thereof as her own property, to be paid to the said Seller, her successor and assigns free of cost, provided that Buyer, its successors and assigns shall not be required to operate said property for the discovery, development or production of oil, gas or other minerals. Inasmuch as Buyer claims and asserts title to and ownership of all of the submerged land lying and being situated at mean high tide under the waters commonly known as Lost Lake and other waters tributary to the Houston Ship Channel, such submerged land is expressly excluded herefrom.

2. The price at which Seller agrees to sell and convey the aforesaid property to Buyer is to be calculated on the basis of the sum of $137.50 for the full fee simple title per acre, excluding the submerged land mentioned above, (the amount of acreage to be determined as hereinafter set out) to be paid in cash at the time of the consummation of this sale. The land, excluding such submerged land, is to be surveyed by a qualified surveyor agreed upon by Buyer and Seller (the expense of the survey to be shared one-half by Buyer and one-half by Seller) and the consideration is to be paid in accordance with the acreage shown by such survey. Seller is to receive the sum of $68.75 for her undivided half interest in each acre shown by the survey.

3. Seller agrees to furnish Buyer a complete abstract or abstracts of title to the aforesaid property and premises covering time from the sovereignty of the soil down to a date not prior to the date of this contract and duly certified by a reliable abstract company or companies, which will show a good and merchantable title to said property in Seller, and Buyer shall have thirty (30) days after the receipt of such abstract or abstracts within which to have the title examined by the attorney or attorneys of its choice and such attorney or attorneys, after examination, shall write a title opinion with respect to said property pointing out defects therein, if any, and a copy of such title opinion shall be delivered to Seller or to Seller's agent and attorney in fact, J. A. Niedermeier, for observation and attention. Seller shall

have thirty (30) days after receipt of a copy of such title opinion within which to remove or cure any valid objection, if any, that may have been pointed out therein, and Seller agrees to use her best efforts to remove and cure the same within such time limit.

If the abstracts furnished show a good and merchantable title to said property in Seller, or if such objections as may be pointed out in the opinion above mentioned are cured and removed within the period of time allowed for that purpose or if such objections are waived by Buyer, then the parties shall proceed with the consummation of this sale by the execution and delivery on the part of Seller of a good and sufficient general warranty deed, conveying said property to Buyer, but reserving the above described non-participating royalty interest, and Buyer shall be given all of the rights to the above mentioned abstract and Buyer shall then pay the total cash consideration agreed upon herein to Seller.

4. In the alternative, in lieu of abstracts of title, Seller may, if she so elects, within thirty (30) days from the date of the execution hereof, furnish Buyer a certificate of title guaranty upon the authorized Texas form issued by a company duly qualified to issue such title guaranty, and if Seller tenders to Buyer such certificate of title guaranty within such thirty (30) day period, the parties shall then proceed with the consummation of this sale by the delivery of Seller of a good and sufficient general warranty deed conveying said property to Buyer, but reserving the above described non-participating royalty interest,

and Buyer shall then pay the total cash consideration agreed upon herein to Seller.

If the company requested to issue such certificate of title guaranty shall point out any valid title objections, Seller shall have thirty (30) days within which to cure or remove such title objection and Seller agrees to use her best effort to cure or remove the same.

5. If title to said property is good and merchantable of record or is made so within the period of time allowed for that purpose or if Seller tenders to Buyer a certificate of title guaranty as provided herein within the period of time allowed for that purpose and if Seller tenders a good and sufficient general warranty deed to Buyer and complies with the terms of this contract in all respects, should Buyer fail or refuse to consummate the transaction within five (5) days from the date of such tender, then the $5,000.00 earnest money hereinafter mentioned and this day posted by Buyer shall be forfeited by Buyer to Seller as full liquidated damages for the breach and default on the part of Buyer and thereupon all parties shall stand released from any further liability hereunder. On the other hand, if the title to said property is not good and merchantable and is not made so within the time provided for such purpose and if Seller does not tender to Buyer the certificate of title guaranty provided for herein within the period of time allowed for that purpose, and Buyer is unwilling to purchase said property by reason thereof, then Buyer shall have the right to rescind this contract

and shall be entitled to the immediate return of said sum of $5,000.00 posted as earnest money and thereupon all parties shall stand released from this contract. Should Seller for any reason refuse to consummate this sale upon the acceptance of title thereof by Buyer, under the terms and provisions hereof, then Buyer, at its election, may have the right to enforce this contract by specific performance.

6. As evidence of good faith and in earnest of this contract Buyer has placed with the First National Bank in Houston the sum of $5,000.00 to be held by said Bank as escrow agent, along with a signed copy of this contract and subject to the terms and provisions thereof, and upon consummation of this sale, said sum of $5,000.00 shall be applied and used as part of the cash payment of said property.

7. At or prior to the time of the closing of this sale, Seller shall furnish to Buyer official tax certificates showing that all taxes with which said property is charged have been paid in full up to and including the year 1949 and taxes for the current year of 1950 shall be prorated and adjusted between the parties hereto as of the closing of this sale.

8. It is agreed that William A. Bernrieder, a real estate agent of Houston, Texas was the procuring cause of this sale for Seller and that he is entitled to a commission of 5% of the total purchase price payable by Seller, at the time of the consummation of this sale, but that Buyer is to have no responsibility whatever for such commission.

9. This contract shall be binding upon and inure to the benefit of the successors and assigns of the parties hereto.

EXECUTED IN triplicate originals, each of the parties and the aforesaid Bank, as escrow agent, receiving one signed copy this 5th day of July, 1950.

MARY A. NIEDERMEIER, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF GEORGE S. NIEDERMEIER, DECEASED

By: /s/ J. A. Niedermeier
J. A. Niedermeier, her agent and attorney in fact

HARRIS COUNTY HOUSTON SHIP CHANNEL NAVIGATION DISTRICT

By: /s/ W. F. Heavey
General Manager

Approved as to form:

FULBRIGHT, CROOKER, FREEMAN, & BATES

By: /s/ Walter J. Morrison
Navigation District Counsel

HARRIS COUNTY HOUSTON SHIP CHANNEL NAVIGATION DISTRICT CREATED AND RATIFIED.

H. B. No. 131] CHAPTER 97

AN ACT creating and establishing the Harris County Houston Ship Channel Navigation District of Harris County, Texas, under Article 3, Section 52, of the Constitution of the State of Texas, for the purpose of the development of deep water navigation, the improvement of rivers, bays, creeks, streams, or canals within or adjacent to such District, with the power and authority to acquire, purchase, take over, construct, maintain, operate, develop, and regulate wharves, docks, warehouses, grain elevators, bunkering facilities, belt railroads, floating plants, lighterage, lands, towing facilities, and all other facilities or aids incident to or necessary to the operation or development of ports or waterways within the District and extending to the Gulf of Mexico, provided in Chapter 9, R. S. 1925; describing said District by metes and bounds; ratifying and validating all orders, notices, elections and proceedings of the Commissioners' Court, Navigation Board and Navigation Commissioners and other officers of Harris County and of the Harris County Houston Ship Channel Navigation District of Harris County, Texas; ratifying and validating the original petition for the establishment of said district and all subsequent orders, notices, hearings, etc., had thereon; and ratifying and validating all notices of elections, the elections, returns thereof and all orders with respect to the issuance of bonds, the levying of taxes to create

sinking funds to retire all of the bonds of said District and to pay the interest thereon; ratifying and confirming the petition, election, and results thereof upon the adoption of the special powers for port facilities, conferred by Subdivision 2, Chapter 9, R. S. 1925, and all orders made pursuant thereto by the Navigation Board and the Commissioners' Court; ratifying, confirming, and validating the petition, order of election, notices, election, returns, canvass by the Court of the votes cast at said election, order authorizing the issuance of bonds, and the bonds in the sum of One Million Five Hundred Thousand ($1,500,000.00) Dollars, voted at an election held in said District on December 4, 1926; authorizing the Commissioners' Court and County officers to levy, assess, and collect taxes sufficient to pay interest on such bonds and the principal thereof as they mature; authorizing the Navigation Commissioners to sell said bonds, the Attorney General to register the same; constituting all orders of the Commissioners' Court and orders of the Navigation and Canal Commission, or certified copies thereof evidenced in the Courts, and declaring an emergency.

Be it enacted by the Legislature of the State of Texas:

SECTION 1. That the Harris County Houston Ship Channel Navigation District of Harris County, Texas, in Harris County, as hereinafter described by metes and bounds, is hereby created and established under authority of Article 3, Section 52, of the Constitution of the State of Texas, for the purpose of the development of deep water navigation and the

improvement of rivers, bays, creeks, streams, and canals within or adjacent to such District, and to construct and maintain canals or waterways to permit of navigation or in aid thereof and for the purpose of and authority to acquire, purchase, undertake, contruct, maintain, operate, develop, and regulate wharves, docks, warehouses, grain elevators, bunkering facilities, belt railroads, floating plants, lighterage, lands, towing facilities, and all other facilities or aids incident to or necessary to the operation or development of ports or waterways within said District and extending to the Gulf of Mexico, as provided in Chapter 9 of the Revised Statutes of 1925; and all orders of the Commissioners' Court of Harris County, Texas, and of the Navigation Commissioners, heretofore made in respect to the creation of such District and the authorization and issuance of the bonds of said District and particularly an issue of One Million Five Hundred Thousand ($1,500,000.00) Dollars of bonds voted at an election under date of December 4, 1926, be and the same are hereby in all things ratified, confirmed, and validated. The said Harris County Houston Ship Channel Navigation District of Harris County, Texas, herenow created and established after consideration of the benefits to the property therein located, is described by metes and bounds as follows, to-wit: –

"Beginning at the entrance to Clear Creek into Galveston Bay; thence running up said creek with the line of Galveston and Brazoria Counties to a point on S. G. Haynie's survey 372 varas S. 62 degrees 32

minutes E. from its west line; thence N. 62 degrees 32 minutes W. 12 miles 318 varas to the head of Brays Bayou; thence N. 56 degrees 30 minutes W. 15 miles 1455½ varas to the old crossing of Buffalo Bayou; thence with the line of Waller County in a straight line to the head of creek; thence down the same with its meanders to the San Jacinto River; thence N. 50 degrees east to the western line of Liberty County; thence with said line to the head of Cedar Bayou; thence down said bayou to its mouth; thence following the boundary line of Harris County to the mouth of Clear Creek, the place of beginning."

SEC. 2. Notice of the intention to apply for the passage of this law has heretofore been given in direct conformity with the Constitution and laws of this State and evidence of such notices having been published has been exhibited in the Legislature before the passage of this bill.

SEC. 3. The petition, orders of the Commissioners' Court, notices of election, the election and orders declaring the result thereof and authorizing the issuance of the following bonds: (a) An issue of $1,250,000.00, dated June 1, 1911, bearing 4½% interest, maturing equally each 10 years for forty years; (b) an issue of $250,000.00, dated March 4, 1914, bearing 5% interest, maturing forty years with an option to redeem same at any time after ten years; (c) an issue of $1,500,000.00, dated August 1, 1919, bearing 5% interest and maturing serially in 30 years; (d) an issue of $500,000.00, dated September 15, 1924 bearing 4½% interest and maturing serially

in thirty years; are herenow in all respects confirmed, approved, ratified, and validated, and held to be the legal and binding obilgations of said Harris County Houston Ship Channel Navigation District.

SEC. 4. The petition of the Navigation and Canal Commissioners of October 7, 1926, to the Commissioners' Court asking for an election for One Million Five Hundred Thousand ($1,500,000.00) Dollars of bonds; the order of the Commissioners' Court of October 11, 1926, ordering an election for said bonds for December 4, 1926; the notices of election, the publication and posting of such notices, the form of ballot, the election itself, the canvass by the Court of the votes cast at said election, and the order of the Commissioners' Court dated December 13, 1926, authorizing the issuance of One Million Five Hundred Thousand ($1,500,000.00) Dollars of the bonds of said District, which bonds are dated February 1, 1927, due $50,000.00 each year for thirty years, bearing interest at the rate of 5%, payable semi-annually, said bonds being in the denomination of $1,000.00 each and setting out the form of said bonds, places of payment, rights of redemption and other details of said issue; the order providing for a tax on all of the taxable property in said District sufficient to pay the interest on said bonds and provide a sinking fund for payment of said bonds at maturity; and all orders of the Commissioners' Court supplementary to and amendatory thereof, are in all respects ratified, confirmed, approved and validated.

SEC. 5. The amount of bonds fixed in the order of said Court calling said election for the purposes set forth in said order is hereby found to be proper and necessary for the purposes set out therein and of benefit to all of the property and tax payers in said District, and is hereby approved and authorized, and the said Harris County Houston Ship Channel Navigation District of Harris County, Texas, is hereby fully authorized and empowered to issue and sell said bonds and use the proceeds of said bonds for the purposes set forth in the order of said Court calling said election, and said bonds as and when issued and sold at any time or from time to time shall be and are hereby declared to be the legal, valid, and binding obligations of said Harris County Houston Ship Channel Navigation District of Harris County, Texas. The Commissioners' Court of Harris County, on behalf of said District, is hereby fully authorized and empowered to levy upon and against all of the taxable property in said Harris County Houston Ship Channel Navigation District of Harris County, Texas, liable therefor, in the manner and at the time provided for by the General Laws, sufficient taxes to pay the interest on said bonds and provide sinking funds for the payment of said bonds at maturity.

SEC. 6. The Attorney General of the State of Texas, an presentation to him for approval of any or all of said bonds duly executed as provided by law, in the form set forth in the order referred to, is authorized to approve and certify the same as valid and binding obligations of the said Harris County

Houston Ship Channel Navigation District of Harris County, Texas.

SEC. 7. Harris County Houston Ship Channel Navigation District of Harris County, Texas, is authorized and empowered to issue in direct conformity with the Constitution and the laws of this State as and when necessary such bonds as may be voted from time to time by the requisite two-thirds majority of the resident property tax paying voters voting at any election when called and conducted in direct conformity with the Constitution and laws of Texas and to issue and sell the same subject to such provisions of the Constitution and laws of this State as may be in effect at the time, and subject to the approval of the Attorney General.

SEC. 8. The public importance of the purposes herein contemplated creates an emergency and an imperative public necessity requiring a suspension of the Constitutional Rule requiring bills to be read upon three several days in each House and the said Rule is hereby suspended, and this Act shall take effect and be in force from and after its passage and it is so enacted.

Approved June 6, 1927.
Effective June 6, 1927.

[H. B. No. 131 passed the House 106 yeas, 2 nays; passed the Senate 30 yeas, 0 nays.]

V.T.C.A., Natural Resources Code § **33.135**. Notice to Purchaser or Grantee of Coastal Area Property

(a) A person who sells, transfers, or conveys an interest other than a mineral, leasehold, or security interest in real property adjoining and abutting the tidally influenced waters of the state must include the following notice as a part of a written executory contract for the sale, transfer, or conveyance:

> "(1) The real property described in and subject to this contract adjoins and shares a common boundary with the tidally influenced submerged lands of the state. The boundary is subject to change and can be determined accurately only by a survey on the ground made by a licensed state land surveyor in accordance with the original grant from the sovereign. The owner of the property described in this contract may gain or lose portions of the tract because of changes in the boundary.
>
> "NOTICE REGARDING
> COASTAL AREA PROPERTY
>
> "(2) The seller, transferor, or grantor has no knowledge of any prior fill as it relates to the property described in and subject to this contract.
>
> "(3) State law prohibits the use, encumbrance, construction, or placing of any structure in, on, or over state-owned submerged lands below the applicable tide line, without proper permission.
>
> "(4) The purchaser or grantee is hereby advised to seek the advice of an attorney or other qualified person as to the legal nature and effect of the

facts set forth in this notice on the property described in and subject to this contract. Information regarding the location of the applicable tide line as to the property described in and subject to this contract may be obtained from the surveying division of the General Land Office in Austin."

(b) If property described under Subsection (a) of this section is sold, transferred, or conveyed without an executory contract for conveyance, a written statement containing the notice prescribed by that subsection must be delivered to the grantee for execution and acknowledgement of receipt before the conveyance is recorded.

(c) Failure to include the statement in an executory contract for conveyance shall be grounds for the purchaser to terminate such contract, and upon termination any earnest money shall be returned to the party making the deposit.

(d) Failure to provide this statement prior to closing, either in the executory contract for conveyance or in a separate written statement, shall constitute a deceptive act under Section 17.46, Business & Commerce Code.

(e) This section or the action of any party subject to this section does not diminish or modify the beach access and use rights of the public as acquired by statute or under common law.